LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
AUG 2 1973

No. 73-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

CONTINENTAL BAKING COMPANY, *Petitioner*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN H. SCHAFER
888 - 16th Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 - 16th Street, N. W.
Washington, D. C. 20006

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I 9

II 15

CONCLUSION 19

APPENDIX

Opinion of the Court of Appeals 1a

Order Denying Petition for Rehearing 28a

Petition for Rehearing 29a

TABLE OF AUTHORITIES CITED

CASES:

Anheuser-Busch, Inc. v. *FTC*, 289 F.2d 835 (7th Cir. 1961) 2, 12

Balian Ice Cream Co. v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956) .. 12

Beatrice Foods Co. [1967-70 Transfer Binder] Trade Reg. Rep. ¶ 19,045 (FTC 1969) 11

Borden Co. v. *FTC*, 381 F.2d 175 (5th Cir. 1967) 2, 9, 10, 11, 12, 19

Table of Contents Continued

Page

Chapman v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969) 18

FTC v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960) 14, 16, 17

FTC v. *Borden Co.*, 383 U.S. 637 (1966) 14, 16, 17, 18

FTC v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968) 15

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 9

Gray v. *Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, U.S. (June 11, 1973) 2

Lloyd A. Fry Roofing Co. v. *FTC*, 371 F.2d 277 (7th Cir. 1966) 13

Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954) 12

Shore Gas and Oil Co. v. *Humble Oil & Ref. Co.*, 224 F. Supp. 922 (D. N.J. 1963) 11, 12

Tri-Valley Packing Ass'n v. *FTC*, 329 F.2d 694 (9th Cir. 1964), *opinion on remand*, [1965-67 Transfer Binder] Trade Reg. Rep. ¶ 17,657 (FTC 1966), *aff'd and modified*, 411 F.2d 985 (9th Cir.), *cert. denied*, 396 U.S. 929 (1969) 18

United States v. *Topco Associates, Inc.*, 405 U.S. 596 (1972) 14

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 12

MISCELLANEOUS:

BNA, ATRR, Report No. 237, A-1-2 (Jan. 25, 1966) .. 16

S. Rep. No. 698, 63rd Cong., 2d Sess. 3 (1914) 13

S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936) 13

Millstein, *The Status of the Availability Defense*, 42 N.Y.U. L. Rev. 416 (1967) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

CONTINENTAL BAKING COMPANY, *Petitioner,*

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The United States District Court for the District of Colorado rendered no opinion. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 1973 CCH Trade Cas. ¶ 73,433, and is reprinted in the Appendix to this Petition. (App. 1a).

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment, was entered on March 22, 1973. On May 7, 1973 the Court of Appeals denied petitioner's timely motion for rehearing. (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding, contrary to the opinion of the Fifth Circuit Court of Appeals in *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir. 1967), that judgment can be imposed under Section 2(a) of the Robinson-Patman Act against a seller of advertised label and private label products in favor of a competitor of the seller even though the seller shows that the lower private label price on which liability is based was in no way subsidized by, or otherwise dependent upon, the higher advertised label price with which it is compared, so that any injury to the competitor could not have been the result of a difference between the two prices?

2. Whether a seller of both private label and advertised label products "discriminate[s] in price between different purchasers," within the meaning of Section 2(a) of the Robinson-Patman Act, when the seller affirmatively offers both the private label and advertised label products to all customers throughout the market and thereby makes both prices fully available?

3. Whether a jury may be permitted to award damages under a theory that was supported solely by assumptions of plaintiff's counsel which were totally without support in the record?[1]

---

[1] Petitioner will not argue here the reasons for granting the writ as to Question No. 3, and it does not urge that question as an independent ground for the exercise of this Court's certiorari jurisdiction. However, should the Court grant certiorari on either Question Nos. 1 or 2, petitioner urges that it also grant certiorari with respect to Question No. 3 since there is a clear conflict among the circuits as to whether damage calculations based on nothing but assumptions of fact which counsel instructs his damage witness to adopt are adequate to support a judgment. Compare Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied*, — U.S. — (June 11, 1973) with the decision below.

STATUTE INVOLVED

Section 2(a) of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

STATEMENT OF THE CASE

Continental Baking Company ("Continental") seeks review of a decision of the United States Court of Appeals for the Tenth Circuit which affirmed Robinson-Patman Act judgments for $3,468,000 entered upon jury verdicts by the United States District Court for the District of Colorado, plus $360,000 award for attorneys' fees, in favor of The Old Homestead Bread Company ("Old Homestead") and Interstate Brands Corporation ("Interstate"). The basis of jurisdiction of the District Court was 15 U.S.C. § 15.

The parties to this litigation were competing wholesale bread bakers with plants in Denver, Colorado. The "discrimination" complained of was that Continental sold private label bread in the Denver market at prices lower than prices at which it sold its advertised "Wonder" label bread in the same market.

As do all bread markets, the Denver bread market divides into three categories: "advertised" labels and unadvertised "private" labels which are sold by wholesale bakers, and "captive" labels which are baked by chain grocery-owned bakeries for sale in the chains' stores. Old Homestead became the first wholesale baker to sell private label bread in the Denver market when, in early 1964, it started selling such a loaf at one cent below its advertised label price. JA. 524-27.[2] For many years prior to this the three major supermarket chains in the Denver market, operating their own baking plants solely for the supply of their own stores, had sold their own captive labels at retail prices two cents per loaf below the retail prices of the advertised bread available to the non-affiliated retail stores. JA. 537. The three chains thus accounted for approximately seventy-five per cent of all bread sales in the Denver market. JA. 971.

Associated Grocers is a buying cooperative of retailers whose membership includes virtually every non-chain retail grocery store in the Denver market. JA. 1027-28. Responding to considerable pressure from the independent stores for a private label brand that could be priced competitively with the captive labels of the large chains,[3] Interstate began negotiating with a group of AG members early in 1964, offering the AG

---

[2] Record references are to the Joint Appendix filed with the Court of Appeals. A copy of this Joint Appendix has been lodged with the Clerk of the Court.

[3] There appears to have been a period in 1964 when the chains abandoned their policy of underselling the advertised labels and were selling captive label at advertised label prices, but this temporary condition ended permanently at least by early 1965 when both captive and private labels were again selling at retail below the advertised brands. JA 1058-59, 731, 1969. Though the language of the court below is not clear, App. 5a, the court appears

stores a private label bread priced below its advertised label. JA. 596-97. Continental heard about these negotiations, entered the competition, eventually succeeded, and in mid-1964 entered into a letter agreement which was cancellable by either party on sixty days' notice to supply private label bread ("Tender Crust") to such AG stores as desired to purchase it at a price one cent below the Wonder label price, with lower prices available if less services [4] by Continental were chosen. JA. X-849. After the introduction of Tender Crust, Continental offered the same bread at the same prices under different labels to all retailers in the Denver market, thereby making the lower priced bread available to all retail stores who did not wish to participate in the AG program. JA. 1008, 1065, 1972, X-915.

Continental's private label prices were based upon its private label costs and on competition in Denver, and were in no way subsidized by, or otherwise dependent upon, Wonder label prices. JA. 747, 779. The record at trial showed without contradiction that there were substantially lower costs on private label bread so that even though private label prices were lower, profits on private label were comparable to, or even greater than, profits on advertised label products.[5] Except for a

---

to have perhaps construed a resale price maintenance agreement among the AG stores to have tied the retail price of the private label which they were negotiating to purchase to advertise label prices. In fact, the agreement among the stores was to sell their private label bread at the generally prevailing price of the captive labels of the chains. JA 703-04.

[4] Not stocking the store shelves, and/or not taking stale returns.

[5] Lower costs for private label stemmed principally from two sources: (1) Continental of course did not advertise its private label brands but did advertise Wonder; and, (2) under the applicable union contract in the Denver market Continental and its

brief period during the last quarter of 1967 when there was a severe price war throughout the market, Continental sold its private label bread at a profit throughout the six years covered by the two complaints. JA. X-80-115, X-414-23. In fact, during almost all of that extended period Continental achieved a higher profit on private label bread than it did on its advertised Wonder bread. *Ibid.* These facts are detailed in an attachment to this Brief, at page A-1, which shows the comparative profit on Wonder and on Tender Crust throughout the complaint period. These profit comparisons show that throughout the period Tender Crust (and the other private labels of Continental all of which had the same prices[6] and costs for equivalent forms of delivery) was not subsidized or supported in any way by the higher prices charged for the Wonder advertised label.[7] There was no proof to the contrary

---

wholesale bakery competitors paid a salesman's commission on sales of private label bread that was six per cent of the selling price lower than the commission paid on advertised label sales. JA. 979. This six per cent, coupled with the four per cent savings on advertised label, JA. X-80-115, meant that private label costs were at least ten per cent of the selling price lower than advertised label or, in other words, that when Wonder bread sold for twenty cents per loaf private label bread could sell for eighteen cents and obtain the same profit.

[6] On two occasions Continental had to grant lower prices to Tender Crust purchasers to meet the lower prices offered by Rainbo Bread Company. X-864, 886. Other lower prices were offered at the time to other retail purchasers, according to the competition that had to be met, with the result that for brief periods sometimes different prices were charged. X-1099-1113.

[7] The private label profits clearly dispel any suggestion that Continental was motivated by predatory behavior in supplying private label. The trial court itself observed that there was no evidence of predatory conduct, because there was no evidence that Continental was subsidizing its private label sales by sales at higher prices elsewhere. JA. 2294. The suggestion of the Court of Appeals that Continental was guilty of predatory behavior

in the record and there was not even an attempt at such proof.

* * * *

During the years spanned by the complaint there were periods of intensive price competition resulting in low prices and there were periods during which the market prices reached historic highs. JA. X-80-115. During these years, Old Homestead lost substantial business from time to time to other bakers, primarily to Rainbo Bread Company as to whom Old Homestead obtained a judgment in this litigation which has subsequently been settled. JA. 992, 1158. In spite of the price fluctuations normal in a competitive market, and in spite of the fact that Old Homestead lost substantial business to Rainbo in no way caused by Continental, Old Homestead was allowed to present to the jury a damage theory that ignored these facts, and instead sought to assess Continental for all of Old Homestead's alleged losses, including those caused by itself and those caused by Rainbo. This claim was concededly based solely on instructions of Old Homestead's counsel that the damage witness was to assume that, but for Continental's sale of Tender Crust, prices would have been

---

because it raised its prices immediately after Old Homestead went out of business overlooks the undisputed record fact that Continental announced these price increases in mid-December 1967, well before it knew that Old Homestead was going out of business. JA. 919-20, 994.

In any event, predatory behavior is not a violation of the Robinson-Patman Act, on which statute alone the decision below was predicated. As the court below noted, predatory behavior may be relevant to the competitive injury test of the statute. App. 9a. However, it has nothing to do with whether the Act requires a showing of injury resulting from a price difference, as opposed merely to low prices, nor to whether availability negatives any discrimination among different purchasers—the two issues of law presented by this Petition.

uniformly ten per cent higher throughout the complaint period, and that but for these sales Old Homestead would have sold nine million more pounds of bread at eighteen cents per pound. JA. 1446. The trial court itself called this theory "speculative." JA. 1422 *passim*. These unfounded assumptions of counsel yielded a hypothetical result that had Old Homestead operating during the damage period at an apparent profit, whereas in fact Old Homestead had not operated at a profit since 1959—five years before the introduction of private label bread. JA. X-432.

The damage claim of Interstate was similarly based on an unsupported assumption of fact. Interstate's claim was that if Interstate's sales had increased $1,000 a week, its profit would have increased $488 each week. JA. X-1114-15. There is no way Interstate could have obtained a profit of 48.8 per cent on added sales at the market prices in the Denver market during the complaint period. This would have required the selling price of bread to be about twice the direct costs of production and sale. These costs to Interstate were 17.1 cents per loaf. JA. 2064. Market prices were never anywhere near thirty-four cents per loaf. The highest they had ever been was twenty-one cents per loaf, a level reached in the middle of the complaint period. There is no evidence whatever that Continental prevented market prices from reaching thirty-four cents per loaf.

REASONS FOR GRANTING THE WRIT

This Petition raises two fundamental issues concerning the interpretation of the Robinson-Patman Act, and the degree to which that Act may be construed to prevent sellers from passing along to their customers

the cost savings inherent in private label merchandising. The court below decided the case in a manner that results in a square conflict on one issue with decisions of other courts of appeal, and in an apparent conflict with a decision of this Court on a second issue. These conflicts require resolution by this Court. Review is additionally warranted because the decision below, if allowed to stand, will impair the ability of the smaller grocery stores to obtain from suppliers like Continental lower priced private label brands and thus compete more effectively with the larger chain stores which can produce their own private labels. The decision will also tend to dry up a source of cheaper bread for consumers.

I.

In both courts below Continental, relying principally on the Fifth Circuit's holding on remand in *Borden Co.* v. *FTC*, 381 F.2d 175 (5th Cir., 1967), argued that plaintiffs' causes of action required them to establish a connection between their alleged injury and the price difference between Continental's advertised and private label breads. Continental contended that it was not enough for plaintiffs, in a "primary-line" Robinson-Patman Act case like this one where injury is alleged to sellers competing with the defendant, to show only that they lost sales or revenues as a result of a competitor's lower price. Instead, it must be shown that injury was caused by a *difference* in prices. In non-primary-line cases, where the injury alleged is to purchasers competing in the resale of the product, the causal connection is almost inherent in the price difference since one customer is forced to pay more for the same product than does his competitor. *E.g., FTC* v.

Morton Salt Co., 334 U.S. 37 (1948). In primary-line cases, however, injury does not result from the *difference* in price, as opposed to a low price, unless the two prices have some causal relationship. In these cases the Act's requirement that actionable injury be the result of a price discrimination can only be satisfied by showing that the lower price is dependent upon the higher price.

The court below rejected this argument by not considering it.[8] In a petition for rehearing, App. 29a, Continental once again stressed the holding of the *Borden* case as to the required causal nexus, but once again the court below failed to respond. (App. 28a).

Borden, like this case, involved private label pricing where the claim was, *inter alia,* that Borden had injured primary-line competition with other milk producers by selling its private label milk at a lower price than that charged for advertised label milk in the same market. The Fifth Circuit first noted that

> "Borden did not subsidize below-cost or unrealistically low prices on its private label milk with profits received from sales of the Borden brand." 381 F.2d at 177.

It then rejected the primary-line injury claim because of

> "the absence of the necessary causal relationship between the difference in prices and the alleged

[8] The court's opinion discussed the Fifth Circuit's *Borden* opinion solely in terms of a contention relating to "consumer preference," a point that was not even raised by Continental. (App. 12a-15a).

> competitive injury. . . . [N]one of the evidence adduced by the testifying competitors relates to the price difference between the milks marketed by Borden; . . . . The competitors actually assert only that Borden was able to sell private label milk for a lower price than they could, and regarding that assertion, the price of Borden brand milk is immaterial in this case. In short, the evidence simply does not support the precise price discrimination alleged in the complaint. Therefore, injury proved in the primary line, if any, is not the *effect of* the price difference at issue." (Emphasis in original.) 381 F.2d at 180.

The facts of this case are indistinguishable. The Fifth Circuit's analysis would have required judgment for Continental.[9]

Several years earlier, in another case involving price differences within one market, a district court in the Third Circuit had reached the same result. *Shore Gas and Oil Co.* v. *Humble Oil & Ref. Co.*, 224 F. Supp. 922 (D. N.J. 1963). In language which sets forth with great clarity the rationale on which *Borden* was later based, the court said:

> "Where, as in the instant case, haphazard individual prices at varying levels are offered in a single geographic market for the purpose of com-

---

[9] The Tenth Circuit's discussion of injury to competition said to result from Continental's construction of a new plant and increased market share is irrelevant to this issue. Thus, the Fifth Circuit in Borden assumed there was injury to competition but held no violation was shown because the injury was caused only by unconnected lower private label prices rather than by a price difference. See, also, Beatrice Foods Co., [1967-70 Transfer Binder] Trade Reg. Rep. ¶ 19,045 (FTC 1969).

> petitively gaining particular business accounts and primary-line injury is claimed, the principles of causation are essentially similar to those of territorial price discrimination. . . . When a seller underbids a competitor, thereby injuring him, *the injury is an 'effect' of discrimination only if the low price is supported by other prices and their profits, wherever charged.* Otherwise, the low price alone has caused the injury and the price discrimination is but incidental . . . . If the [low] price is completely self-sufficient, it may be inferred that no relationship between high and low prices exists, and therefore that the discrimination had not the prescribed 'effect.'" (Emphasis added and footnotes omitted). 224 F. Supp. at 926.

This direct recognition that in a primary-line case it is only lower prices that are supported by higher prices, and not merely unconnected lower prices, that may be the basis of a Robinson-Patman Act judgment is supported by this Court's decisions in those other primary-line cases that deal, not with different prices in one market as this case does and *Borden* and *Shore Gas* did, but with so-called territorial price discrimination. There the claim is of low prices in the market in which plaintiff competes and higher prices in markets in which plaintiff does not compete. In those cases this Court has always stressed the evidence that the low price charged in plaintiff's market was subsidized by profits made on higher prices charged in other markets. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). The courts of appeal have required the same evidence in these territorial cases. *E.g., Anheuser-Busch, Inc.* v. *FTC*, 289 F.2d 835 (7th Cir. 1961); *Balian Ice Cream Co.* v. *Arden Farms Co.*,

231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956); *but cf. Lloyd A. Fry Roofing Co.* v. *FTC,* 371 F.2d 277, 285 (7th Cir. 1966).[10]

To the degree possible the Robinson-Patman Act should be construed to permit private label merchandising rather than to prohibit it. Private label offers lower prices to consumers and permits greater equality of competition between chain and non-affiliated retail stores. The result of this case, in which Continental has suffered a judgment of almost four million dollars where its total gross sales revenue for the sales complained of during the damage period was only about 3.6 million dollars (JA. 823, X-1121), will clearly stifle similar efforts to market food products at lower prices.

---

[10] These decisions requiring a showing of dependence of the low prices on higher prices are also supported by the legislative history. Congress was clearly legislating not against low prices, but against low prices subsidized by higher prices. Both houses of Congress filed identical reports in 1914 and 1936 in reporting, respectively, the Clayton Act and the Robinson-Patman Act. In 1914 both houses discussed the evil of large concerns injuring smaller concerns with local price cuts and observed:

> "Every concern that engaged in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities." *E.g.,* S. Rep. No. 698, 63rd Cong., 2d Sess. 3 (1914).

The 1936 reports of both houses were again identical, and said in pertinent part:

> "Discriminations in excess of sound economic differences involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers not granted them." *E.g.,* S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

The rule adopted by the Tenth Circuit, when coupled with this Court's decision of last term in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), would make it virtually impossible for small independent retailers to compete in the sale of private label merchandise with large vertically integrated chains. *Topco*, which was decided under the "rigid" *per se* rules that condemn horizontal restraints, 405 U.S. at 609-10, struck down a cooperative private label agreement between independent grocers designed to give them competitive equality with A&P, Safeway, Kroger and other large national chains. *Topco,* however, still allows independents and smaller chains to have access to private label, so long as they do not combine with others in a manner that violates the Sherman Act.

In the decision below, however, the Tenth Circuit has affirmed a judgment under the Robinson-Patman Act of nearly four million dollars based upon the sale of private label products to independent grocers, even though the lower prices on the private label products were themselves profitable and therefore were not supported by profits made on higher priced advertised label products. Unlike *Topco* the result below cannot be justified by reference to any rigid *per se* rules; this Court itself has characterized the provisions of the Robinson-Patman Act that are applicable to the sale of private label products as being "flexible . . . provisions" that may take account of the difference between "branded and unbranded commodities." *FTC* v. *Borden Co.*, 383 U.S. 637, 646 (1966).

The Court has previously noted that the Robinson-Patman Act was "motivated principally by congressional concern over the impact upon secondary-line competition of the . . . chain stores." *FTC* v.

Anheuser-Busch, Inc., 363 U.S. 536, 543 (1960). And the Court has recognized that it "cannot . . . construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

Patently, the imposition upon Continental of a huge penalty for selling private label bread to independent merchants to allow them to compete with the captive label bread baked by large chain stores is not compatible with the purposes of the Robinson-Patman Act and cannot lightly be countenanced by a court that has shown sensitivity to those purposes in applying that Act. Nor is it compatible with the public interest in achieving lower food costs by eliminating expenditures, such as for advertising. This is not, of course, to argue that Continental is automatically immunized from the provisions of the Act simply because of the obvious benefits of private label merchandising. What it does show, though, is that the Court should look carefully at the decision below to determine whether a result which is clearly socially undesirable is required by the Robinson-Patman Act.

II

An additional aspect of the decision below which requires this Court's consideration relates to the generally recognized "availability" doctrine. See, Millstein, *The Status of the Availability Defense*, 42 N.Y.U. L. Rev. 416 (1967). A full expression of this Court's views on the availability doctrine is urgently needed to clarify the right of suppliers to sell private label goods at lower prices, without Robinson-Patman Act difficulties, by offering such goods to all customers at the same lower price, while at the same time continuing to offer

The court below rejected the availability contention on the ground that the Tender Crust private label was not available to those few stores that did not belong to AG unless they paid a membership fee. But Continental never rested its availability contention on the theory that the Tender Crust label was available to all stores. Instead, Continental relied on the evidence, confirmed by plaintiffs' own witness, JA. 1972, that Continental offered bread under a variety of private labels to all buyers in the market at the established private label price. JA. 928, 1008-09, 1066, X-915.[12]

The lower court also indicated doubt that the availability doctrine would apply in a primary-line case. This suggestion is without support in the authorities and appears to be contrary to this Court's holding in *Borden,* which included primary-line claims. Certainly the Act itself does not support a distinction between primary- and secondary-line for availability purposes. If a price difference is not discriminatory among different purchasers, that should be the end of the inquiry under the Act, and that result should surely not depend upon whether primary-line or secondary-line injury is alleged.

The Ninth Circuit has held that availability is a complete answer in secondary-line cases. *Chapman* v. *Rudd Paint & Varnish Co.,* 409 F.2d 635 (9th Cir. 1969); *Tri-Valley Packing Ass'n* v. *FTC,* 329 F.2d 694, 703-04 (9th Cir. 1964), *opinion on remand,* [1965-67 Transfer Binder] Trade Reg. Rep. ¶ 17,657 (FTC 1966), *aff'd and modified,* 411 F.2d 985 (9th Cir.), *cert. denied,* 396 U.S. 929 (1969). The same result is

[12] The jury was presented with the availability defense only in the same inapplicable terms as those considered by the Tenth Circuit. JA. 2659. The jury never was instructed to consider the case in terms of Continental's contention that private label prices under various labels were available to all purchasers.

equally required in a primary-line case involving a single market with no territorial price discrimination. Where a seller offers every purchaser both a lower priced label and a higher priced advertised label, the seller's conduct is totally free of any discrimination between different purchasers. The lawfulness of such fair and reasonable business conduct should not be left in any doubt or required to proceed under the cloud of confusion created by the opinion below.

CONCLUSION

The court below has reached a result that is squarely in conflict with the *Borden* decision of the Fifth Circuit, and other decisions, on a matter of fundamental importance to the construction of the Robinson-Patman Act. Additionally, the decision appears to be in conflict with this Court's own opinion in *Borden*. If permitted to stand the result below will undoubtedly inhibit manufacturers in passing on to retailers, and thence to consumers, lower food prices permitted by economies obtainable through private label merchandising. The result will also tend to solidify the competitive edge of large retail chains over non-affiliated retail stores.

For the reasons stated in this Petition, the writ should be granted.

Respectfully submitted,

JOHN H. SCHAFER
888 - 16th Street, N. W.
Washington, D. C. 20006
Attorney for Petitioner

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 - 16th Street, N. W.
Washington, D.C. 20006

Dated: August 3, 1973

A-1

ATTACHMENT

Profit (or Loss) Comparison of Wonder and Tender Crust as Shown by C-817, 893

(In Cents, per Loaf)

	Wonder	Tender Crust
1964		
3rd	1.88	2.09
4th	1.69	2.14
1965		
1st	1.16	1.65
2nd	1.61	1.66
3rd	1.91	1.82
4th	1.51	1.34
1966		
1st	0.02	2.07
2nd	1.37	3.02
3rd	0.19	3.33
4th	2.31	3.38
1967		
1st	2.14	3.74
2nd	2.97	4.67
3rd	1.38	3.50
4th	(0.83)	(0.82)
1968		
1st	(1.61)	1.52
2nd	(0.93)	0.63
3rd	0.98	3.98
4th	0.78	3.96
1969		
1st	0.51	4.67
2nd	0.73	0.30
3rd	1.95	1.16
4th	0.97	0.60
1970		
1st	1.04	0.34
2nd	1.44	0.72

CERTIFICATE OF SERVICE

This is to certify that I have this date served the attached Petition for Writ of Certiorari on The Old Homestead Bread Company and on Interstate Brands Corp. by mailing three copies of the same, airmail postage prepaid, to their respective counsel of record John S. Pfeiffer, Gorsuch, Kirgis, Campbell, Walker and Grover, 1900 Security Life Building, Denver, Colorado 80202; and Edward L. Foote, Winston, Strawn, Smith & Patterson, First National Bank Building, Chicago, Illinois 60603. All parties required to be served have thus been served.

JOHN H. SCHAFER

August 3, 1973